ROSITA AMIT

v.

TAN BOON SENG

HIGH COURT SABAH & SARAWAK
HAIDAR MOHD. NOOR J
[SUIT NO. KG. 148 OF 1988]
5 MAY 1989

CIVIL PROCEDURE: *Application under O. 15 r. 6(2)(b) of the Rules of the High Court 1980 - When such an application may be allowed.*

The applicant (PBB) pursuant to O. 15 r. 6(2)(b) of the Rules of the High Court 1980 applied for an order that it may be added as a defendant in the present suit. The applicant had entered into a loan agreement with the defendant for a sum of RM 70,000 to enable the defendant to purchase one property, whereby the said property was assigned to the applicant as security for the loan.

Subsequently, the defendant purported to sell the property to the plaintiff without the knowledge or consent of the applicant. This was clearly in breach of the loan agreement in particular cls. 22 and 59 thereof. The plaintiff had lodged a caveat against the property. The plaintiff instituted action against the defendant claiming for specific performance of the agreement and damages. The question here is whether the applicant's case comes within the ambit of O. 15 r. 6(2)(b) of Rules of the High Court 1980.

Held:

[1] Test to be applied should be as expounded by the Privy Council in *Pegang Mining Co. Ltd.'s* case i.e., "Will his ("the applicant") rights or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?"

[2] In this case the plaintiff be allowed to enter judgment, the applicant will no longer have any rights, title and interest in the property and in fact will be deprived of the benefit of the property. The applicant has been given the rights title and interest in the property when both the defendant and applicant executed the deed of assignment. The assignment clearly purported and was intended in point of form to be absolute assignment because of the use of word "absolute" in cl. 1 of the agreement.

[3] Also, the applicant by the filing of the caveat of the property on 26 April 1986 before the plaintiff lodged its caveat, had made it known to the world at large of it's rights, title and interest to the property and the plaintiff should have had notice of this.

[4] Privity of contract is not applicable here, as O. 15. r. 6(2)(b) of the Rules of the High Court 1980 allows any person to be joined as a party if it is necessary to ensure that all matters in dispute in the cause or matter will be effectually and completely determined and adjudicated upon.

[Application allowed.]

Cases referred to:
Hj. Abdul Rahman bin Lisi v. Haji Hassan bin Haji Yunos [1983] 1 MLJ 96
Pegang Mining Co. Ltd. v. Choong Sam & Ors. [1969] 2 MLJ 55
Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd. [1985] CLJ ((Rep) 231
Comfort v. Betts [1891] 1 QBD 740
Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd. [1989] 1 CLJ (Rep) 41
Hughes v. Pump House Hotel Co. Ltd. [1902] 2 KB 190
Read v. Brown [1889] 22 QBD 128
Walter & Sullivan Ltd. v. J. Mumphy & Sons Ltd. [1955] 2 WLR 919
Hee Awa & Ors. v. Syed Muhammad Sazaly & Anor. [1988] 1 MLJ 300

Legislation referred to:
Rules of the High Court 1980, O. 15 r. 6(2)(b)

For the plaintiff - K.C. Wong; M/s. K.C. Wong & Associates Advocates Kuching
For the defendant - S.Y. Chan; M/s. Ee & Lim
For the applicant - K.J. Foo; M/s. Foo, Kana & Co.

JUDGMENT

Haidar Mohd. Noor J:

Public Bank Berhad ("the applicant") by way of summons in chambers filed on 7 March 1989, (encl. 19) applies for an order that the Writ of Summons No. KG 148/1988 may be amended by adding its name as a defendant. The grounds of the application are:

(i) the presence of the applicant before the Court is necessary to ensure that all matters in dispute in the action may be effectually and completely determined and adjudicated upon, and/or;

(ii) the reliefs asked for by the plaintiff in this case affect the rights of the applicant in the same subject matter, and it is just and convenient that the Court be called upon to determine such questions or issues that may arise therefrom or that may relate thereto or be connected therewith;

(iii) such other grounds as appear in the affidavit of Mr. John Chua Kheng Chiew sworn in support thereof.

The application is made under O. 15 r. 6 (2)(b) of the Rules of the High Court 1980 ("RHC") and is supported by the affidavit of John Chua Kheng Chiew, the manager of the applicant.

Rule 6(2)(b)reads:

> (2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application
>
> (a) ...
>
> (b) order any of the following persons to be added as a party, namely:
>
> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, or
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine between him and that party as well as between the parties to the cause or matter;

but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized.

This jurisdiction of the Court to grant or refuse the order of making any person as a party (with the exception as a plaintiff unless with his consent) is entirely discretionary.

It is to be noted that the defendant, through his Counsel, Miss S.Y. Chan, did not object to the application. From the record, it is also to be noted that the defendant has not filed any defence to the action filed by the plaintiff and also no affidavit in opposition is filed to the O. 81 application of the plaintiff.

Therefore in this application it is necessary for me to consider the facts relating to the subject matter at issue and at stake. The subject matter is a unit of single storey semi-detached house on Sub-Lot 8 of Lot 488 Section 65 Kuching Town Land District ("the property"). The property is now up for grabs, if I may say so, where the plaintiff wishes the property to be transferred to her, and the applicant objects to this and now seeks to intervene, purportedly on the ground that it has rights, title and interests in the property, by virtue of, the loan agreement, deed of assignment and the memorandum of charge in escrow.

The facts:

On 30 December 1985 a sale and purchase agreement was entered into between Won Development Sdn. Bhd. ("the developer") and the defendant for the sale of the property by the developer to the defendant.

On 8 April 1986 the defendant entered into a loan agreement with the applicant for a sum of RM 70,000 to enable the defendant to purchase the property.

The defendant bound himself to the terms and conditions of the loan agreement (see 'JC1' to encl. 19). The defendant further entered into a deed of assignment dated 8 April 1986 (Exhibit 'JC2) with the applicant, whereby the defendant, *inter alia*, assigned to the applicant the defendant's rights, title and interests in the property as security for the loan of $70,000. At the time of the execution of the loan agreement between the applicant and the defendant, the title deed to the property has not been issued yet and to protect its rights, title and interests the applicant caveated the property *vide* Caveat Instrument No. 5157/1986 (Exhibit 'JC3').

On 31 December 1986 the defendant entered into a sale and purchase agreement (see Exhibit 'RBA1' to encl. 9) with the plaintiff purporting to sell the property to her in spite of the deed of assignment in favour of the applicant. This agreement, ('RBA1') with the plaintiff was executed by the defendant without the knowledge or consent of the applicant and would clearly appear to be in breach of the loan agreement ('JC1') in particular cls. 22 and 59 thereof. For the sake of convenience, I reproduce below cls. 22 and 59 of Exhibit 'JC1':

22. The borrower (s) shall not transfer sell charge or otherwise howsoever deal with the said property or any part thereof or any interest therein or make the same subject to any burden charge encumbrance liability or lien whatsoever or make any application for the alteration of the category of land use or for the imposition of any fresh category of land use in respect of the said property (or for rescission removal or amendment of any condition or restriction affecting the said property) without the written consent of the bank first had and obtained.

59. The parties hereto agree that during the continuance of this loan agreement no dealing whatsoever be registered against the said property unless the bank has given its consent in writing to such registration.

As a result of the agreement dated 31 December 1986 between the plaintiff and the defendant, the plaintiff lodged a caveat against the property *vide* Caveat Instrument No. 6088/88. On 1 July 1988 the plaintiff instituted the Writ of Summons No. KG. 148/1988 against the defendant claiming, *inter alia*, for specific performance of her agreement with the defendant and for damages. No defence has been filed by the defendant.

On 16 August 1988 the plaintiff applied for a summary judgment under O. 81 r. 1 of RHC (encl. 9) and again the defendant did not seem to file any affidavit in opposition to the plaintiff's said application. Having thus not taken any positive steps to defend the action and the O. 81 application of the plaintiff, the defendant under the circumstances perhaps readily did not object to the application of the applicant to intervene in this action. Be that as it may, in the present application to intervene, the Court is only concerned with whether the applicant's case comes within the ambit of O. 15 r. 6(2)(b) of Rules of the High Court.

The applicant through the affidavit of its manager, John Chua Kheng Chiew asserted that a sum of RM 60,000 was released pursuant to the loan agreement (see para. 7) and the balance sum of RM 10,000 yet to be disbursed is explained in paras. 13 and 14 thereof. The defendant defaulted in making instalment payments to the applicant in the manner covenanted under the loan agreement and the deed of assignment and is indebted to the applicant as at 31 October 1988 in the sum of RM 70,653.22 and interest on the amount owing has been agreed at and is accumulating at the rate of 11% per annum on monthly rests. The applicant by a letter of demand dated 31 October 1988 through its solicitors demanded for payment of the debt owed in the sum of RM 70,653.22 but the defendant has failed and continues to fail to make payment. Consequently, the applicant filed proceedings in the Sessions Court Kuching *vide* Summons No. Suit KG. 357/1988/1 against the defendant to recover the sum owing and this case is still pending in the Sessions Court, Kuching.

So much for the facts. I will now have to apply them, according to law, to see whether or not the applicant may be allowed to intervene. To follow Yusof Abdul Rashid J in *Hj. Abdul Rahman bin Lisi v. Haji Hassan bin Haji Yunos* [1983] 1 MLJ at p. 96, the test to be applied should be as expounded by the Privy Council in the case of *Pegang Mining Co. Ltd. v. Choong Sam & Ors.* [1969] 2 MLJ 55.

> Will his ("the applicant) rights or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

In the present action, the plaintiff is seeking specific performance of the purported sale and purchase agreement entered into between the plaintiff and defendant and from the record, the defendant has not taken any positive steps either to defend the action itself or to oppose the application of the plaintiff under O. 18 r. 1 of RHC in which event that in all probability the plaintiff may get the judgment if not for the present application to intervene by the applicant. If that be the case, the applicant will no longer have any rights title and interests in the property and in fact will be deprived of the benefit of the property. It is then, I think, necessary to examine whether the applicant has any rights title and interests in the property, the subject matter of the action, which may be affected by the order of the Court as in this case if judgment is given to the plaintiff.

In considering the rights title and interests of the applicant, in my view, it is important first to consider whether the deed of assignment ('JC2') is an absolute one, not purporting to be by way of charge only. In this context, the issue of assignment was extensively dealt with by the Federal Court in the case of *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development*

Sdn. Bhd. [1985] CLJ (Rep) 231. In *Nouvau's* case, the appellant had purchased from the developer a shop office unit in a multi-storey shopping and office complex to be erected on land in Johor Bahru for the sum of RM 184,320 Subsequently the appellant entered into an agreement with the Public Bank, which agreed to give the appellant a fixed loan of RM 92,160. The appellant entered into a loan agreement with the bank and also executed an assignment of all his rights, title and interests in the property pending the issue of the strata title to the bank. Subsequently the respondent purchased from the developer the whole shopping and office complex excluding the units already sold by the developer. The appellant commenced proceedings against the respondent for certain declaratory reliefs. After the filing of the originating summons the assignment was revoked following the repayment and settlement of the fixed loan. A preliminary objection was taken by the respondent that the action could not be maintained in the name of the appellant as assignor. The learned Judicial Commissioner upheld the objection and struck out the proceedings. The Federal Court affirmed the decision of the Court but for different reasons. The factual situation would appear, I think to be the same as in the present action except that here it was the defendant who purportedly by the sale and purchase agreement sold the property to the plaintiff without the applicant's consent.

Now, the assignment of 8 April 1986 appears to be in the form of a legal document signed by all the parties concerned, viz., assignor (defendant), assignee (the applicant) and the vendor (the developer). After reciting that (a) the defendant had entered into a sale and purchase agreement with the developer for the purchase of one unit of single storey semi detached house on Sub-Lot 8 of 488 Section 65 Kuching Town Land District, (b) that the Public Bank (the applicant) would give a loan to the defendant to enable him to pay off the balance of the purchase price, (c) that when the "title" of the property was issued and registered in the name of the defendant he would execute and register a first legal charge of the property in favour of the Public Bank and, (d) pending the issue of the "title" the defendant would assign to the Public Bank all his rights, title and interests in the property and the defendant duly executed the assignment in the following terms:

> 1. The assignor as beneficial owner of the said property hereby assign **absolutely** to the bank all his right, title and interest under the sale and purchase agreement and in and to the said property and the full benefits granted thereby and of all stipulations therein contained together with all the remedies for enforcing the same to hold the same unto the bank/assignee subject only to the proviso for redemption hereinafter contained.
>
> (Clause 1 of JC2) (emphasis is mine)

Clause 2 provides for the assignor's warrants and covenants with the applicant/assignee. Clause 2.5 especially is very relevant and reads:

> this assignment shall remain in force until such time as it shall be revoked by the due execution and registration thereof by the assignor of the said legal charge over the said property in favour of the bank/assignee.

In cl. 4, the vendor ("the developer") gives consent to the assignment and the vendor ("the developer") duly acknowledge a copy of the said assignment and had some duly recorded (see p. 7 of the assignment). In cl. 6 it reads:

> This deed shall be binding on the heirs personal representatives successors in title and assigns of the assignor and the respective successors in title and assigns of the bank/assignee and the vendor.

Therefore looking at the whole document of 8 April 1986 (JC2) I am of the opinion that the document was an **absolute assignment** and not purporting to be by way of charge only within the meaning of s. 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in

the sense that the assignor (the defendant) intended to pass and transfer to the assignee (applicant/bank) absolutely the beneficial interest as well as the rights title and interests in the sale and purchase agreement dated 30 December 1985 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be assignment because of the use of the word "absolute" in cl. 1 thereof (see Fry LJ in *Comfort v. Betts* [1891] 1 QBD at p. 740, recent Supreme Court case of *Hipparion (M) Sdn. Bhd. v. Chung Khiaw Bank Ltd.* (Civil Appeal No. 35 of 1988) delivered on 8 April 1989;[1989] 1 CLJ (Rep) 41. If the assignment was an absolute one (not purportedly to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the sale and purchase agreement and the beneficial interest of the assignor in the property under the sale and purchase agreement by way of security only did not derogate from the absolute character of that assignment (see *Hughes v. Pump House Hotel Co. Ltd.* [1902] 2 KB 190 and *Comfort v. Betts* (*supra*).

In the case of *Nouvau, supra,* the Federal Court at p. 369 held that if the assignment was an absolute one, not purporting to be by way of charge only, within the meaning of s. 4(3) of the Civil Law Act 1956, then the assignor was not entitled to sue in its own name but the action should be brought by the assignee in its own name or by the assignee in the name of the assignor (*Read v. Brown* [1889] 22 QBD 128, *Hughes v. Pump House Hotel Co. Ltd.* (*supra*) and *Walter & Sullivan Ltd. v. J. Mumphy & Sons Ltd.* [1955] 2 WLR 919). Likewise here, in my view, the plaintiff should have brought the action against the assignee, the applicant, though perhaps the plaintiff can claim of no knowledge of the said assignment at the time of the filing of this action against the defendant. If that be the case, there is the more reason for the applicant to intervene and be made a party to this action. In fact, in my opinion, the applicant can rightfully claim to step into the shoes of the defendant in this action.

The applicant in addition thereto, filed a private caveat on 25 April 1986 to protect its interest and the plaintiff filed a private caveat later on 6 June 1988 (see Exhibit 'RBA2') and the plaintiff at the time of entering the sale and purchase agreement with the defendant should have checked whether the property is free from encumbrances and this she failed to do until, according to para. 13 of her affidavit (encl. 9) in support of her O. 81 application she caused to make a search of the property on 28 June 1988 through her advocate, M/s. K.C. Wong and Associates. I think there is a failure on her part, or even that of her Counsel, to act vigilantly before executing the said sale and purchase agreement otherwise she would not have so executed the said agreement if the encumbrances came to her knowledge. Whatever it is, the applicant by the filing of the caveat of the property on 26 April 1986 had made known to the world at large of its rights title and interests to the property and the plaintiff should have had notice of this. It is not disputed that the sale and purchase agreement between the plaintiff and the defendant was made without the written consent of the applicant in breach of the loan agreement and the deed of assignment between the defendant and the applicant.

The plaintiff's Counsel submitted that in order for the applicant to succeed it must be privy to the contract between the plaintiff and the defendant. I am unable to accept such a contention as O. 15 r. 6(2)(b) allows **any person** to be joined as party if it is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. In the present action it cannot be said that the applicant has no rights, title and interest in the property by virtue of the deed of assignment. In para. (ii) of O. 15 r. 6(2)(b) **any person** may be added as a party, if in the opinion of the Court, it

is just and convenient to determine any question that may exist or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter as between him and that party as well as between the parties to the cause or matter. Therefore if the relief sought by the plaintiff to get an order of specific performance in respect of the property were granted, in my opinion, the rights, title and interests of the applicant would be gravely and adversely affected. In the case of *Hee Awa & Ors. v. Syed Muhammad Sazalay & Anor.* [1988] 1 MLJ 300 in respect of a running down case, the Supreme Court at p. 301 held that the learned Judge exercised his discretion correctly when he allowed the application by the respondent who are already defendants in the action to intervene to add the motorcyclist as a co-defendant and the application falls squarely within O. 15 r. 6(2)(b) and the respondents have a choice either to proceed under O. 15 r. 6(2)(b) or O. 16 (relating to third party proceeding).

As I am of the opinion that the assignment was an absolute one, not purporting to be by way of charge only, the defendant it would appear (without going into the merits) has no right to purportedly execute a sale and purchase agreement over the property to the plaintiff. Following the judgment of the Federal Court in *Nouvau's* case (*supra*) I am of the opinion that the plaintiff is not competent to sue the defendant when the assignment is still subsisting and the applicant has a rightful claim to be made a party to this action if not for the substitution of its name for the defendant. It follows, in my view, that this application satisfies the provision of O. 15 r. 6(2)(b) of the Rules of the High Court.

In the premises, I would make the following order:

(a) the application of the Public Bank (the applicant) to intervene is allowed.

(b) the proceeding in the Sessions Courts *vide* Summons No. Suit KG. 357/1988/1 be stayed pending the outcome of this action.

(c) Costs of this application be costs in the cause.

Also found at [1989] 2 CLJ 683